IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 228 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PALSING NANIYA MASAR & ANOTHER : Appellants.
Versus
STATE OF GUJARAT : Respondent.

Appearance:
MR LM CHHABLANI for the appellants.
Mr. S.T. Mehta, APP for the State.

CORAM : MR.JUSTICE H.R.SHELAT
and
MR.JUSTICE J.R.VORA

Date of decision: 24/02/2000

ORAL JUDGEMENT: (Per: H.R. Shelat, J.)

The appellants were placed on trial in the Court of the then learned Additional Sessions Judge,

Sabarkantha at Himatnagar, in Sessions Case No.83 of 1991, in connection with the offence of murder punishable under Section 302 read with Section 114 of the Indian Penal Code, and on 27th February 1992 came to be convicted thereof and sentenced to rigorous imprisonment for life and pay a fine of Rs. 100/-, in default rigorous imprisonment for 5 days more. Being aggrieved by such order of conviction, the present appeal is filed by the appellants, the original-accused.

2. In order to appreciate the rival contentions, necessary facts may be stated. Within the local limits of Village Tandol Kampa in Himatnagar Taluka, there is a quarry owned by Dharmabhai wherein some labourers were working. Rupabhai Chandana, Navalbhai Chandana, Dala Rupa Chandana, Babu Rupsinh, Lala Marta the deceased, Palsinh - the appellant No.1, and others were the labourers working in the quarry. They were also residing nearby erecting small huts or tents. On 7th October 1991 in the morning the daughter of Palsinh was answering the natural call near the Khakhra tree which was found to be the leeward place. Lala Marta, the deceased at 6.00 O'Clock in the morning had gone out to take Babul tree brush for cleaning the teeth. At that time the dogs were barking. Lala Marta therefore threw a stone at the dogs but unfortunately it fell very close to the daughter of appellant No.1 who was at that time answering the natural call. Palsing's (the appellant No.1) daughter after reaching home complained him about throwing of a stone at her. The appellant No.1 then assumed the said act to be the amorous gesture and escapade and became fiery. Meanwhile, Lala Marta was seen coming with the pot of water. The appellant No.1 seeing him went out of his hut taking a stick and gave two stick blows on the left side, as a result of which Lala Marta sustained injuries. The appellant No.2 came out of her hut and threw a stone at Lala Marta. Rupabhai Chandana seeing the incident went to the spot and rescued Lala Marta. Navalsing, Babubhai and others also rushed to the scene of offence. Lala Marta was then taken to the Civil Hospital at Himatnagar where he during the course of the treatment died. The Doctor performed the post mortem and opined that because of the injuries sustained by Lala Marta he died and such injuries were sufficient in ordinary course of nature to cause death. A complaint with Himatnagar Town police station then came to be lodged against the appellants who are the parents of minor girl qua whom the incident happened. At the conclusion of the investigation, a chargesheet for the offence punishable under Section 302 read with Section 114 and Section 135 of the Bombay Police Act came to be filed in the Court of the Chief

Judicial Magistrate, at Himatnagar. The learned Chief Judicial Magistrate was not competent to try the case of the offence of murder. He therefore committed the same to the Court of Sessions at Himatnagar which came to be registered as Sessions Case No. 83 of 1991. The same was assigned to the then learned Additional Sessions Judge, Sabarkantha at Himatnagar who framed the charge to which both the appellants pleaded not guilty. The prosecution then led necessary evidence. Appreciating the evidence before him, the learned Additional Sessions Judge found that the prosecution had beyond reasonable doubt succeeded in establishing the charge levelled against the appellants. He therefore held both the appellants guilty of the offences punishable under Section 302 read with 114 of the Indian Penal Code and sentenced them as aforesaid. He however acquitted both the appellants of the offence punishable under Section 135 of Bombay Police Act. The appellants have therefore preferred this appeal calling in question the legality and validity of the order of conviction and sentence inflicted.

3. Mr. L.M. Chhablani, the learned advocate representing the appellants initially advanced his arguments on different grounds, but when query was made by us he tapered of his submissions confining to the only point regarding applicability of a particular provision of the Indian Penal Code. Rupabhai Chandana, the eye witness is examined at Ex.10. Babubhai Rupsing, another eye witness is examined at Ex.12 and Dr. Manish Amrabhai Suvera who performed the post mortem has figured at Ex.7. Rest of the evidence is not material for any reference while determining the issue that arises for consideration. Perusing the evidence of the 3 witnesses, we when made it clear to the learned advocate representing the appellant that irresistible conclusion that can be drawn from that evidence is that because of the injuries he sustained Lala Marta died. The injuries were caused by the stick blows and one of the injuries was caused by throwing a stone. It follows from such proved facts on record that Lala Marta died of unnatural death. Whether such death would fall within the ambits of Section 302 constituting the offence of murder or within the ambits of Section 304 constituting the offence of culpable homicide not amounting to murder is the only point that remains to be determined. With his usual candour learned advocate after labouring much conceded that only one point now remains to be determined in this appeal and therefore he has confined to this only point that arises for consideration accepting rest of the findings of the trial Court.

4. If by the act the injury is caused with the intention to kill or the injury caused is likely to cause death, or with the knowledge that death must be the most probable result, the act is prima facie a murder. While the act committed with the knowledge that the death will be a likely result is culpable homicide not amounting to murder. To put it differently, the act of causing injury is culpable homicide where death must have been known to be a probable result. It is murder where it must have been known to be the most probable result. Hence, what can be the intention or knowledge of the accused at the time of committing the alleged act is to be ascertained in order to determine which of the two penal provisions would come into play. An intention is the mental process and the same has to be judged from the facts and circumstances on record.

5. From the evidence of above two eye witnesses, it becomes clear that the minor daughter aged about 7 to 8 years of the present appellants was in the morning answering the natural call in the leeward place close to the Khakhra tree. At that time Lala Marta the deceased was passing by the road for taking the Babul-tree branch used as tooth brush (Datan). At that time the dogs were barking. With a view to save himself from the attack of the dogs he threw the stone at the dogs but unfortunately the stone fell close to the daughter of the appellants. The daughter of the appellant then under mistaken belief assumed much against Lala Marta. She after going back to her house informed the appellant No.1, her father in a complaining tone. Hence the appellant No.1 was enraged. At that time unfortunately Lala Marta was coming back fetching water too. Seeing him the appellant No.1 was excited and his languor was knowing no bounds. He took the stick and went out of his hut. He, going near to Lala Marta, started to shower stick blows, two of them struck on left side of the Lala Marta's body, as a result he fell down. At that time, the appellant No.2 also came out because of the uproar and joined her husband, the appellant No.1. She then threw a stone which also struck Lala Marta but it is not made clear on what part of his body and what type of injury was caused. Lala Marta was not in a position to take care of himself because of the injury he sustained. The eye witnesses and others who had assembled there then took him to the hospital where the Doctor examined him and during the course of the treatment he died. Dr. Manish Suvera who performed the post mortem found that Lala Marta died because his spleen was ruptured. From these established facts, we have to ascertain what can be the intention of the appellants.

6. After their daughter informed, of course under mistaken impression about pelting from Lala Marta, the appellants were excited and annoyed and they reacted seeing Lala Marta approaching after fetching water. So, their act or reaction was in the heat of excitement upon the information from their daughter which had deprived them of the self-control and they inflicted the injuries in retribution for what Lala Marta had done. This would therefore show that their intention was not to kill Lala Marta but to take a revenge & teach a lesson.

7. Even viewing the facts from another angle, it appears that the intention can never be to kill. Of course on the left side of the body, two blows struck but they were on the part other than the vital part of the body but certainly very close to the spleen. Ordinarily if one or two blows are given near the spleen, the wrongdoer would never believe or know that because of the blow he is giving on the portion near the spleen the man would in all probabilities die but if the spleen for whatever reason is weakened the same would be ruptured even when one or two blows are given or little force is used which would hardly be possible in a case when a healthy man is attacked. In the present case, there was no reason whatsoever for believing that by the blows the appellant No.1 was giving the spleen would be ruptured leading to the death of Lala Marta. There was no reason for them to believe that the spleen of the deceased was weak. Two blows were given as stated hereinabove in retribution for what Lala Marta had done may be under the mistaken impression or belief that was cultivated because of the information in complaining tone given by their daughter. Here is, therefore, a case where without any intention to cause death, but certainly with the knowledge that by the stick blows death is probable, injury by stick blows is caused. When that is so, the case would fall within the ambits of Section 304, Indian Penal Code and not Section 302 Indian Penal Code. Here is, therefore, a case of culpable homicide not amounting to murder.

8. The next question that arises for consideration is whether both the appellants can be held guilty for the offence under Section 304. The evidence of the above two eye witnesses makes it clear that initially the appellant No.1 came out of his hut seeing Lala Marta coming and he started to shower the blows. After Lala Marta fell down sustaining the injuries, appellant No.2 went out of her hut and in the heat of excitement threw stone which struck Lala Marta some where. It is not made clear which

injury was caused by the stone; but it can be said that Lala Marta must have sustained abrasion either near the left ankle or near the left hand and thigh which are mentioned in P.M. Note. Such injury was not at all fatal. Both the appellants have in this case come out of the hut individually and in turn and that too of their own accord without any joint plan. After appellant No.2 threw stone, the appellant No.1 has done nothing. Both have done the wrong in their individual capacity, and not in furtherance of their common intention. The appellant No.2 was not cognizant of the knowledge of appellant No.1 or about his intention as suddenly he had left the hut. Though she joined later on to do the wrong she cannot be fastened with the liability of committing the wrong done by appellant No.1. Both have done the wrong independently and the same had sprung wholly from the respective minds. The respondent No.2 has not instigated or intentionally aided. She has mechanically reacted. Hence both cannot be fastened with the liability of the offence under Section 304; not even reading Section 114 or 34 together. Both had in short individually, because of the excitement, gone out and therefore each one is liable for his/her individual act and not for the act of the other one.

9. The appellant No.2 gave stick blows and two of them struck on the left side near the spleen. As the spleen was ruptured Lala Marta died. The appellant No.1, therefore, in view of the above discussion, can be said to have committed the offence under Section 304 and not under Sec. 302, I.P.Code while appellant No.2, who subsequently came out and threw the stone and caused the above referred minor injury, can be said to have committed the offence punishable under Section 323, I.P.C. only.

10. The next question that arises for consideration is under which part of Section 304 the case relating to appellant No.1 falls. If the act is done with the intention of causing death and the death results, first part of Section 304 would come into play, but if the act is done with the intention of causing such bodily injury which is likely to cause death or is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death, the second part of Section 304 would come into play. In view of the above discussion, it can well be said that the appellant No.1, when he was giving stick blows, must have the knowledge that the injuries he was causing were likely to cause death, but without any intention to cause death. In this

case, therefore, Part II of Section 304 will come into play. The learned Judge has in such facts & circumstances misdirected himself in appreciating the evidence and fell into error in hurriedly reaching the conclusion that the facts on record were constituting the offence of murder and then fell into error in convicting both the appellants for the offence of murder.

11. The appeal, for the aforesaid reasons, is required to be partly allowed. The same is accordingly allowed. The conviction and sentence, inflicted on both the appellants of the offence punishable under Section 302 read with Section 114 of the Indian Penal Code, are hereby quashed and set aside and both are acquitted of the same. The appellant No.1 is however convicted of the offence punishable under Section 304 Part II of the Indian Penal Code, and is sentenced to rigorous imprisonment for 5 years, and a fine of Rs. 500/-, in default rigorous imprisonment for 6 months more, while the appellant No.2 is convicted of the offence punishable under Section 323 and is sentenced to simple imprisonment for 2 months and a fine of Rs. 100/-, in default simple imprisonment for a month more.

12. The appellants at present are on bail. Their bail bonds shall stand cancelled on undergoing the sentence, if remains any. The appeal is accordingly disposed of.
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